

KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.

SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400
WASHINGTON, D.C. 20036-3209

(202) 326-7900

FACSIMILE:

(202) 326-7999

November 22, 2006

Ex Parte Filing

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: *Pay Telephone Reclassification and Compensation Provisions of the
Telecommunications Act of 1996*, CC Docket 96-128

Dear Ms. Dortch:

I write on behalf of AT&T, BellSouth, and the Verizon telephone companies, in response to an ex parte filing by the American Public Communications Council, dated October 25, 2006, in this docket. APCC makes one argument that is arguably new: it claims that the Commission's regulations governing intrastate payphone line rates – under which rates for basic payphone lines are contained in state tariffs and remedies for allegedly unlawful rates are governed by state law – constitute an unlawful “subdelegation” of the Commission's authority. This argument is without merit.

As an initial matter, because APCC identifies no basis in federal law for any supposed obligation to pay refunds for payphone line rates that purportedly exceeded NST-compliant rates, the claim that the Commission has improperly delegated responsibility for providing that remedy fails at the first step. Cf. APCC *ex parte* at 8 (“The legally required remedy for . . . violations of Section 276 does not *change* merely because the Commission allowed review of NST compliance to be performed by state public service commissions.”) (emphasis added).

In any event, to the extent APCC intends to argue more broadly (in reliance on *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir. 2004) (“*USTA IP*”)) that, by allowing states to continue to regulate payphone line rates, the Commission improperly delegates responsibility for implementation of Section 276, its argument is incorrect.¹ Section 276(b)(1)

¹ In any event, the argument comes much too late, as the Commission's determination that basic payphone lines would continue to be tariffed in the states was reached in the Commission's Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation*

defines the Commission's responsibilities under Section 276; that includes the requirement that the FCC "prescribe regulations," including regulations that "prescribe a set of nonstructural safeguards for Bell operating company payphone service." 47 U.S.C. § 276(b)(1)(C). The Commission has done so, and has not purported to delegate any responsibility or authority to the states.

The states have always had responsibility for regulating intrastate payphone line rates – that authority was not delegated by the Commission. Pursuant to Section 276, the Commission has established certain federal pricing regulations that govern the states' exercise of that authority. Nothing in the text or structure of Section 276 suggests that Congress intended to require the Commission to regulate all aspects of the provision of telecommunications services to payphone providers or to preclude the Commission from determining that, by adopting a federal pricing standard and leaving responsibility for application of that standard to the states, it fulfilled its mandate under Section 276. The APCC never sought review of that judgment before, and it provides no basis for any such challenge now.

Indeed, far from being a complaint about improper delegation of federal authority, APCC's concern appears to be that the Commission should have preempted state authority more broadly. But that policy judgment is well within the Commission's discretion under *Chevron* and, as noted, APCC's challenge to regulations adopted a decade ago (under APCC's very watchful eye) comes far too late in any event.

USTA II does not support APCC's argument. That case concerned the Commission's responsibility under Section 251(d)(2) of the Act to "determine[e] what network elements should be made available." 47 U.S.C. § 251(d)(2). In the *Triennial Review Order*,² the Commission expressly "delegate[d] to the states some of our authority pursuant to section 251(d)(2)." *Triennial Review Order*, 18 FCC Rcd 16978, ¶ 188. Because Section 251(d)(2) requires *the Commission* to apply statutory standards and make policy judgments entailed in defining the network elements subject to unbundling under Section 251(c)(3), the D.C. Circuit determined that it was improper for the Commission to delegate that responsibility to any outside entity, including the states. *See USTA II*, 359 F.3d at 566. Here, by contrast, the Commission has not delegated any responsibility under Section 276 to the states. As noted, its responsibility is to adopt regulations to implement the Act, and it has carried out that responsibility.

Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 21233 (1996). APCC (and many others) petitioned for review of various aspects of the order, but the determination that states should retain regulatory authority over basic payphone line rates was not challenged.

² Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004).

Marlene Dortch
November 22, 2006
Page 3 of 3

In accordance with 47 C.F.R. § 1.1206(b)(1), please include this letter in the record of this proceeding. If you have any questions concerning this matter, please contact me at (202) 326-7900.

Sincerely,

/s/ Aaron M. Panner
Aaron M. Panner

cc: Daniel Gonzalez
Michelle Carey
Scott Deutchmann
Scott Bergmann
Christopher Killion
Diane Griffin
Thomas Navin
Donald Stockdale
Tamara Preiss
Paula Silberthau
Albert Lewis
Pamela Arluk
Lynne Engledow